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No. 80-198

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

RONALD S. BOUCHER,

Petitioner,

vs.

CITY OF HAVRE and COUNTY OF HILL, political subdivisions of the State of Montana,

Respondents.

ON WRIT OF CERTIORARI
TO THE MONTANA SUPREME COURT

RESPONDENT CITY OF HAVRE'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

Introduction 1

Reasons Why Petition . . . . Should be Denied 2

Jurisdiction 2

Statement of Case 2

Conclusion 5

TABLE OF AUTHORITIES

Cases:

New York Central and H.R. Co. v. New York, 186 U.S. 269 2

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RESPONDENT CITY OF HAVRE'S BRIEF IN OPPOSITION

The Respondent, City of Havre respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the opinion of the Montana Supreme Court

dated March 26, 1980.

REASONS WHY THE PETITION SHOULD BE DENIED:

JURISDICTION

Petitioner did not raise the lack of due process under the Federal Constitution in the State Court proceeding as is shown by the opinion of the Montana Supreme Court and by Petitioner's Petition for Rehearing. All of Petitioner's arguments dealt with the Montana Constitution and the state law. There was an adequate opportunity to raise the question in the brief filed by Petitioner prior to the Supreme Court ruling as well as in his Petition for a rehearing afterward. Therefore, under New York Central and H.R. Co. vs. New York, 186 U.S. 269, (1902), the petition should be denied.

STATEMENT OF THE CASE

The Petitioner's Statement of the

Case is nearly complete, but wrongfully asserts that the law officer is immune under Montana law for his actionable conduct (page 5). The statute §2-9-305, M.C.A. set forth in the Petition at A-33, requires the officer to be joined in the action and expressly provides that he is liable if he acted intentionally or feloniously. Furthermore, the Petitioner failed to state that the Complaint of Ronald Boucher alleged that the law officer acted negligently or knowingly, intentionally and maliciously. (Appendix Page A-5 herein). If an intentional act was proved, the law officer was liable.

In the Petitioner's Argument for Granting the Writ, it is asserted that the dismissal with prejudice of the law officer was only procedural since the law officer was immune. The argument overlooks the plain language of the statute §2-9-305, M.C.A. which Petitioner should have been

aware of. The dismissal was not of a "non-responsible party" as asserted now by the Petitioner but of a party liable for his intentional act, and the officer was the only person whose act could make the Respondent liable. The Montana Supreme Court ruled correctly under the pleadings and record before it as it followed the existing majority rule and did not overrule any prior Montana decision.

The responsibility of the Respondents here is vicarious whether based upon common law or statute and is a matter of state, not federal law. If that law, whether common law or statutory also provides, as the state court decision indicates, that a final release of the agent releases the principal, this is a matter of substantive state law and certiorari should not lie.

CONCLUSION

For these reasons, the Petition should be denied.

DATED this 19th day of August, 1980.

Respectfully submitted,

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Attorney for Resqondent, City of Havre

APPENDIX

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF HILL

RONALD S. BOUCHER,

Plaintiff, Civil NO. 15595

vs.

REX DRAMSTAD, CITY OF HAVRE, COUNTY OF HILL, STATE OF MONTANA,

Defendants.

COMPLAINT

COMES NOW the Plaintiff and for his cause of action against the Defendants complains and alleges as follows:

I.

That Plaintiff, Ronald S. Boucher, is a resident of the City of Havre, County, of Hill, State of Montana.

II.

That the Defendant, Rex Dramstad, is a

resident of the City of Havre, County of Hill, State of Montana, and at all times here mentioned was a duly appointed, employed and acting policeman of said City and County.

III.

That Defendant, City of Havre, is a municipal corporation, located within the boundary of Defendant, County of Hill, a political subdivision of the State of Montana.

IV.

That at all times herein mentioned, Defendant, Rex Dramstad, was employed by and acting as agent for the City of Havre, the County of Hill, and the State of Montana, acting under color of the laws, statutes, ordinances and regulations of the State of Montana and engaged in the performance of said duties as policeman for said City of

Havre. That the relationship of respondeat superior existed between the City of Havre, the County of Hill, the State of Montana and said Defendant, Rex Dramstad.

IV.

That on or about September 25, 1974, at approximately 3:40 a.m., the Havre Police Department received a phone call advising them of a possible burglary in progress at the Highway Grocery in North Havre, Montana; that the Havre police officers who were dispatched and responded to this call were officers Rex Dramstad and Kenneth Kooch.

V.

That upon arriving at the scene, the officers above mentioned observed broken glass near the front window of the Highway Grocery Store. Further investigation revealed someone inside of the building. That the officers then ordered the suspect

out of the building at gunpoint where he was advised that he was under arrest and asked to identify himself.

VI.

That the Plaintiff, Ronald S. Boucher, was the above mentioned suspect; and that he exited the grocery store building and was searched by the officers. That at this point in time, the Plaintiff, turned away from the officers and began moving away up the north side of the street.

VII.

That at this point, Defendant, Rex Dramstad, discharged his weapon, hitting the Plaintiff in the back, knocking him to the ground and seriously wounding him.

VIII.

That immediately after the shooting, the Plaintiff was rushed to the Northern Montana Hospital in Havre, Montana where he received

emergency medical care. That he was then transported by ambulance to Columbus Hospital in Great Falls, Montana, at which time he was operated upon for the gunshot wound. That by reason of the injury resulting to the Plaintiff from the aforesaid shooting which was done by the Defendant, the plaintiff was hospitalized for an extended period of time, from the 25th day of September, 1974, to the 12th day of February, 1975.

IX.

That as a proximate result of the said shooting, Plaintiff was injured and suffered complete paraplegia of his mid-torso on down.

X.

That the acts, conduct, and behavior of the Defendant Dramstad, were performed negligently, or in the alternative, knowingly, intentionally, and maliciously. That the Defendants, City of Havre, County of Hill, and

State of Montana, negligently exercised their official judgment in the hiring, training, and continued employment of the Defendant police officer. That the act of the Defendant, Dramstad, clearly demonstrated the use of excessive and abusive force under the circumstances, and further showed a gross disregard for the rights and safety of the person of the Plaintiff; the Plaintiff suffered excruciating pain, mental and physical pain and anguish, as well as a loss of present and future earnings, and present and future medical expenses, as a proximate result thereof.

WHEREFORE, judgment is prayed for as follows:

1. For the permanent paraplegic disability to the Plaintiff in the sum of Six Hundred Thousand Dollars ($600,000.00).

2. For the reasonable value of all incurred medical and hospital expenses in the sum of Twenty Five Thousand Dollars

($25,000.00).

3. For the reasonable value of all medical and hospital expenses expected to be incurred in the future, by reason of such injury in the sum of Fifty Thousand Dollars ($50,000.00).

4. For the reasonable value of damages sustained by loss of wages and future earning capacity in the sum of Nine Hundred Thousand Dollars ($900,000.00).

5. For the reasonable value of past, present and future pain, suffering and mental anquish in the sum of Six Hundred Thousand Dollars ($600,000.00)

6. For punitive damages to be assessed against Defendants Rex Dramstad and City of Havre in the sum of Five Hundred Thousand Dollars ($500,000.00).

7. For any other relief as the Court may

deem proper and equitable, including costs of suit.

DATED this 27th day of September, 1976.

DALEY & SHERLOCK

By /s/ Joseph F. Daley
Attorneys for Plaintiff
29 Second Street East
Kalispell, Montana 59901